



**Akombo v Republic (Criminal Appeal E015 of 2024)
[2025] KEHC 1520 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E015 OF 2024
DK KEMEL, J
FEBRUARY 28, 2025**

BETWEEN

MICHAEL OTIENO AKOMBO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment and decree of Hon. B Limo (PM) in Siaya Chief Magistrate’s Sexual Case No. E019 of 2024 delivered on 20th March, 2024)

JUDGMENT

1. The Appellant herein Michael Otieno Akombo was charged with an offense of defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on diverse dates between the 17th day of February 2024 and 12th March 2024 at Gem Sub-county within Siaya County, intentionally and willfully caused his penis to penetrate the vagina of S.A.O. a child of 10 years.
2. He was likewise charged with an alternative charge of committing an indecent act with a child contrary to section 11 (A) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on diverse dates between 17th day of February 2024 and 12th March 2024 at Gem Sub-County of Siaya County, intentionally and willfully touched the vagina of S.A.O a child aged 10 years with his penis.
3. Upon the charge and the particulars thereof being read to him, he admitted the charge as true. He also admitted the facts as true. A plea of guilty was entered. He was thus convicted on his own plea of guilty. He was later sentenced to serve 30 years’ imprisonment.
4. Aggrieved, the Appellant lodged the present appeal wherein he raised the following grounds:



- i. That he was charged, convicted with the aforementioned offense, and sentenced to 30 years' imprisonment without the cause of a trial thus resulting in a miscarriage of justice and prejudicial in the criminal justice system rules and regulations.
 - ii. That he pleaded guilty guilty by the time of plea taking due to harassment and un- procedural device since he was arrested on 14/3/2024, presented to court on 18/3/2024, and convicted on 20/3/2024.
 - iii. That it is the duty of the court and a substantial aspect to inform an accused person his rights and fundamental freedoms as contemplated under Article 50(1)(2) a b c & k of the Constitution.
 - iv. That his rights to make a defense and mitigation was not considered by the trial magistrate which vitiated the whole spectrum of trial process.
5. For the foregoing reasons, he prayed that this Honorable court do comply with Articles 19(1)(2) and 21 of the Constitution when hearing and determining the appeal herein and the sentence thereof.
 6. The appeal was canvassed by way of written submissions. Both parties duly complied.
 7. The Appellant submitted that he informed the court that he wanted to use Dholuo language but the court chose Kiswahili. That the plea taking was done in Kiswahili, a language that he does not understand. He thus submitted that the plea was not unequivocal.
 8. The Appellant further submitted that the three elements of age of the victim, penetration and identity of the perpetrator were not proved to warrant a conviction.
 9. For the foregoing reasons, the Appellant prayed that the appeal be allowed, conviction quashed and that the sentence be set aside and that he be set to liberty. In the alternative, he prayed that the sentence of 30 years' imprisonment be set aside and replaced with a very least severe form of punishment.
 10. The Respondent submitted that on page one of the proceedings line 15, the Appellant confirmed that he understood Kiswahili. That the charge was read out and he responded "True". That thereafter, a plea of guilty was entered and the prosecutor went ahead to read the facts of the case. That the Appellant was then asked whether the facts were correct and he answered "the facts are correct"
 11. It was further submitted that the trial magistrate convicted the Appellant on his own plea of guilty. That the Appellant then went ahead to mitigate as follows: "I will not repeat the offence again. The minor is my step daughter". The Respondent thus submitted that the plea was taken in a language the Appellant understood, hence he understood the charge he was facing.
 12. Further, the Respondent submitted that the fact that the Appellant mitigated and pleaded for leniency showed that he understood the charge he was facing. It was urged that the conviction be upheld.
 13. On sentencing, the Respondent submitted that sentencing is discretionary on the part of the trial court and that the superior court could only interfere where the trial court failed to consider material factors or imposed an excessive or harsh sentence. In the Respondent's view, the sentence was just and legal.
 14. I have considered the trial court proceedings, grounds of appeal, and the submissions filed. I find the issues for determination are firstly, whether the plea made by the Appellant was unequivocal and secondly, whether the sentence imposed was appropriate
 11. The manner of recording a plea is provided for in sections 207(1) and (2) of the Criminal Procedure Code as follows:



- (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;
- (2) If the accused person admits the truth of the charge otherwise than by a plea agreement, his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

12. The manner of recording a plea of guilty was dealt with in *Ombewa v Republic* [1981] eKLR where the Court of Appeal held that:

“In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —

‘Held:

- (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
- (ii) the accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded;
- (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
- (iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
- (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused’s reply should be recorded.”

12. In the instant case, it is noted from the proceedings as submitted by the prosecution that the Appellant chose Kiswahili as the language that he understood. That upon the charge being read out he responded that it was true. He also confirmed that the facts were true. Upon conviction on his own plea of guilty, he mitigated and pleaded for leniency and further added that he would not repeat the offense and that the minor was his step daughter. I am thus satisfied that the Appellant understood the language used in court and by extension the charge he faced. I find that the plea of guilty entered was unequivocal. Consequently, I do not find any reason to interfere with the conviction arrived at by the learned trial magistrate. The Appellant in his grounds of appeal claimed that his defence was not considered by the trial court. There was no trial since the Appellant pleaded guilty to the charge and hence the issue of a defence did not arise at all. The Appellant also claimed that he was rushed through the process. However, the record of the court shows that the trial magistrate did warn him of the nature of the charge and the seriousness and that he went ahead to indicate that he was ready to take the plea. The fact that he gave his mitigation and promised not to repeat the mistake again, is clear evidence that he understood the charge that he faced. In any event, the provisions of section 348 of the *Criminal Procedure Code* provides that no appeal shall be allowed in the case of an accused who has pleaded



guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

12. On the issue of sentencing, it is trite that an appellate court will not usually interfere with the discretion of the trial court unless the sentence imposed is excessive or harsh or that the same is illegal.
12. The law provides for a sentence of life imprisonment for a person convicted of defiling a child of 11 years and below. The Judiciary Sentencing Policy Guidelines 2016, set out the purposes of sentencing at page 15 paragraph 4.1 as:
 - a. Retribution: to punish the offender for his/her criminal conduct in a just manner.
 - b. Deterrence: to deter the offender from committing a similar offense and discourage other people from committing similar offenses.
 - c. Rehabilitation: to enable the offender to reform from his criminal disposition and become a law-abiding person.
 - d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damage...
 - e. Community protection: to protect the community by incapacitating the offender.
 - f. Denunciation: to communicate the community's condemnation of the criminal conduct.
12. Further, in the New Zealand case of R vs. AEM (2000) the court held that: "the main purposes of punishment are to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield to them they meet this punishment."
12. In the instant case, the trial magistrate ordered the Appellant who is aged 31 years, to serve 30 years' imprisonment. I find the sentence not excessive as the victim has been psychologically scarred for the rest of her life. The Appellant being the victim's step father was expected to protect the vulnerable and hapless minor but not to turn her into his wife. It is instructive that the Appellant chased away his wife so as to get an opportunity to molest the young girl. I find the sentence is commensurate with the nature of the offence. As the Appellant was in custody at the time of conviction, the sentence imposed should commence from the date of arrest namely 13/3/2024.
12. In the result and save only that the sentence shall commence from the date of arrest (13/3/2024), the appeal lacks merit. The same is dismissed.

Orders accordingly.

DATED, AND DELIVERED AT SIAYA THIS 28TH DAY OF FEBRUARY 2025.

D.KEMEI

JUDGE

In the presence of:

.....Appellant

.....for Respondent

.....Court Assistant

